United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7164

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B P/S

GEORGE DUCKETT and DELORES DUCKETT,

Plaintiffs-Appellants,

v.

EVE SILBERMAN,

Defendant-Appellee.

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

BRIEF OF PLAINTIFFS-APPELLANTS

NATHANIEL R. JONES, Esq.
JAMES I. MEYERSON, Esq.
N.A.A.C.P.
1790 Broadway
New York, New York 10019
(212) 245-2100
Attorneys for Plaintiffs-Appellants

THOMAS HOFFMAN, Esq.
Of Counsel

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IN THE

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FOR THE SECOND CIRCUIT

No. 77-7164

GEORGE DUCKETT and DELORES DUCKETT,

Plaintiffs-Appellants,

v.

EVE SILBERMAN,

Defendant-Appellee.

BRIEF OF PLAINTIFFS-APPELLANTS

Question Presented

Whether the Plaintiffs-Appellants made out an unrebutted prima facie case of racial discrimination, under the Civil Right Acts of 1866 and 1968 (42 U.S.C. Sections 1982 and 3601, *et seq.*) entitling them to appropriate relief thereunder?

Statement of the Case

This is an action in which the Plaintiffs-Appellants (hereinafter referred to as Appellants) seek relief for the alleged violation of their constitutional and civil rights. More specifically the Appellants assert and allege that they were denied equal access to and opportunity at pursuing to completion the purchase of a house, on the open real estate market, because of their race.

Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. Sections 1331 and 1343 (3) and (4) in conjunction with the Civil Rights Acts of 1866, 1871, and 1968 (42 U.S.C. Sections 1981, 1982, and 3601, *et seq.*) and the Thirteenth Amendment to the United States Constitution, this being an action seeking redress for the alleged violation of the Appellants constitutional and civil rights.

Appellants initially sought preliminary injunctive relief barring the proposed sale of the house in question to other persons, pending the full and complete outcome of this litigation. An evidentiary hearing was held in November, 1975 at which time the Appellants called three witnesses and at which time the Defendant-Appellee (hereinafter referred to as Appellee) declined to introduce any testimony or other evidence whatsoever. Thereafter, the District Court undertook consideration of the motion and, on January 23, 1976, entered a Memorandum and Order denying the Appellants' prayer for preliminary relief.

The case was finally submitted to the District Court upon the evidence presented on preliminary injunctive relief, three depositions taken by the Appellants thereafter in this respect, and an Agreed Upon Stipulation of Facts with attachments.

On March 15, 1977 the District Court, the Honorable John Platt, presiding, entered a Supplemental Memorandum and Order dismissing the Appellants' case and awarding judgment in favor of the Appellee with costs.

Believing that they had made out an unrebutted prima facie case of discrimination, actionable under the aforementioned civil rights acts, the Appellants filed a Notice of Appeal seeking a reversal of the final order below by this Court.

ARGUMENT

I.

The Law

A. *Plaintiffs burden of proof*

In *Bush* v. *Kaim*, 297 F. Supp. 151, 162 (N.D. Ohio 1969) the Court laid down several criteria which must be met in order for the Plaintiff to sustain his burden where there has been "a prohibited discrimination" under the Civil Rights Act of 1866.[1] It said:

> "In the sustaining his burden for proving that there has been a prohibited discrimination under the Act,

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[1] In addressing itself to the design of the 1866 Civil Rights Act, the Supreme Court stated in *Jones* v. *Mayer*, 392 U.S. 409, 413, 88 S.Ct. 2186, 20 L.Ed.2d 1189, 1192 (1968):

> "We hold that Section 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." (Emphasis included).

While the Court in *Jones* held, as well, that the 1866 Civil Rights Act and the 1968 Fair Housing Act have "independent and concurrent existence," See: *Bush* v. *Kaim, supra* at page 161; See also: *Johnson* v. *Zaremba*, 381 F. Supp. 165 (N.D.Ill. 1973), *Morris* v. *Cizek*, 503 F.2d 1303 (7th Cir. 1974), *Warren* v. *Norman Realty*, 513 F.2d 730, 733 (8th Cir. 1975), *cert. denied* 423 U.S. 855, 96 S.Ct. 105, 46 L.Ed.2d 81 (1975), nevertheless, it is the evident design of latter to reinforce the former in order to provide yet another vehicle for realizing truly equal opportunity in housing for all persons, irrespective of their race. See: *Bright* v. *Isenbarger*, 314 F. Supp. 1382, 1393 (N.D. Ind. 1970); *United States* v. *Mintzes*, 304 F. Supp. 1305, 1313 (D.C. Maryland 1969); *Crim* v. *Glover*, 338 F. Supp. 823 (S.D. Ohio 1972). For so long as a Black citizen who wants to buy or rent a home can be turned away simply because he is not white, he cannot be said to enjoy 'the same right . . . as is enjoyed by white citizens . . . to purchase (and) lease . . . real and personal property . . .'" (Emphasis included) *Jones* v. *Mayer, supra* at page 421.

> the Plaintiff must show each of the following elements: (1) that the owner (or responsible party) placed the property on the open market for sale or rental, (2) that the Plaintiff was willing to rent or purchase the property on the term specified by the owner, (3) the Plaintiff communicated this willingness to the owner at a time when the property was available for sale or rent, (4) that the owner refused to rent or sell the property to the Plaintiff on the terms which the owner indicated would otherwise be satisfactory, and (5) that there is no apparent reason for the refusal of the defendant to rent the property to the Plaintiff other than the Plaintiff's race."

See also: *Lamb* v. *Sallee,* 417 F. Supp. 282, 285 (E.D. Kentucky (1976); *Fred* v. *Kokinokos,* 347 F. Supp. 942, 944 (E.D. N.Y. 1972). It is submitted that, in light of the sophisticated modes of racially discriminatory conduct employed by real estate entrepreneurs, today,[2] a requirement of anything more than what is set forth by the Court in *Bush* would effectively foreclose any meaningful private

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[2] Justice Douglas spoke to this point in his concurring opinion in *Reitman* v. *Mulkey,* 387 U.S. 369, 381, 87 S.Ct. 1627, 18 L.Ed. 2d 830 (1967), citing Civil Rights U.S.A., Housing in Washington, D.C., U.S. Commission on Civil Rights 12-15 (1962). He stated:

> "Real estate brokers . . . are largely dedicated to the maintenance of segregated communities. Realtors commonly believe it is unethical to sell or rent to a Negro in a predominately white or all white neighborhood."

And the Court long ago recognized that:

> "The 13th Amendment as well as the Civil Rights Act of 1866 (42 U.S.C. Section 1981, *et seq.*) nullifies sophisticated, as well as small-minded, modes of discrimination. *Lane* v. *Wilson,* 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939)."

Newbern v. *Lake Lorelei, Inc.,* 308 F. Supp. 407, 416 (S.D. Ohio 1968).

prosecution of allegedly racially discriminatory real estate practices.

It is established, too, that "race need not be the sole reason for the decision to refuse if it is an element in that decision." *Smith* v. *Sol D'Adler Realty Co.*, 436 F.2d 344, 349-350 (7th Cir. 1971). See also: *Williamson* v. *Hampton Management Company*, 339 F. Supp. 1146, 1147 (N.D. Ill. 1972); *Moore* v. *Townsend*, 525 F.2d 482, 485 (7th Cir. 1975); *Wang* v. *Lake Maxinhall Estate, Inc.*, 531 F.2d 832, 836 at footnote 12 (7th Cir. 1976); *Brown* v. *Rollins, Inc.*, 397 F. Supp. 571, 578 (W.D.N.C. 1974); *Equal Emp. Opp. Comm'n* v. *Kallir, Phillips, Rose, Inc.*, 401 F. Supp. 66, 72, footnote 17 (S.D.N.Y. 1975). Once having established a "prima facie" case of racial discrimination in the rental of particular property, a landlord "may then come forward and rebut the evidence establishing any of these elements . . ." *Id.* See also: *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E.D. Va. 1962), *affirmed* 377 U.S. 678, 84 S.Ct. 1453 12 L.Ed. 2d 609 (1964); *Shaw* v *Garrison*, 328 F. Supp. 390, 395 (E.D. Louis. 1971). The Defendants must show that there were reasons other than the Plaintiffs' race underlying the refusal to rent to the Plaintiff.[3] See: *Bush* v. *Kaim, supra* at page 162.

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[3] Such has been a long standing requirement in civil rights actions touching areas other than housing. See: *Lewis* v. *City of Grand Rapids*, 356 F.2d 276 (6th Cir. 1966), *cert. denied* 385 U.S. 838, 87 S.Ct. 84, 17 L.Ed. 2d 71 (1966) wherein it was held that the City's denial of approval of the transfer of a liquor license to a Black applicant was grounded on racial bias; *Cypress* v. *Newport News General and Non-Sectarian Hospital Association*, 375 F.2d 648 (4th Cir. 1967) where the Fourth Circuit held that the evidence compelled the inference that two Black physicians were denied staff privileges at a hospital because of their race; and *Moore* v. *Board of Education of Chidester School District No. 59*, 448 F.2d 709 (8th Cir. 1971) where the Court held that the School District had unlawfully discriminated against Black teachers in employment matters solely because of race.

Appellants submit that, in light of the fundamental civil and constitutional rights in issue[4] and the difficulty in establishing a deprivation of such rights, the Plaintiff, once having established a "prima facie" case of discrimination, thereby satisfying his or her burden, has the right to demand that the Defendant party show that race was not a criterion in refusing to engage in a real estate transaction with the Plaintiff.

In applying the principles of the "shifting burden"[5] to particular circumstances, Courts have held that the refusal to rent an apartment to an individual was based on race and was therefore illegal. See: *Harris* v. *Jones,* 296

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[4] It has long been recognized that "housing is a necessity of life." *Block* v. *Hirsch,* 256 U.S. 135, 156, S.Ct. 458, 460, 65 L.Ed. 856 (1921). In numerous cases since that time, the Court has reinforced this belief and expanded on the importance it attaches to the equality of opportunity in the area of housing. See: *Jones* v. *Mayer, supra; Reitman* v. *Mulkey, supra; Hunter* v. *Erickson,* 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed. 2d 616 (1969); *Shelley* v. *Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). The result is each of these decisions demonstrates the validity of Mr. Justice Douglas' pronouncement that "urban" housing is clearly marked with the public interest." *Reitman* v. *Mulkey, supra* at page 383 (concurring opinion).

[5] See in this regard (shifting burden requirement), the following employment discrimination cases brought under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000 (e) *et seq.*), and/or the Civil Rights Act of 1886 (42 U.S. 1981), *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973); *Equal Employment Opportunity Commission* v. *University of New Mexico, Albuquerque,* 504 F. 2d 1296, 1305 (10th Cir. 1974); *Rich* v. *Martin Marietta Corporation,* 522 F.2d 333, 347 (10th Cir. 1975); *Sabol* v. *Snyder,* 524 F.2d 1009 (10th Cir. 1975); *Gilliam* v. *City of Omaha,* 388 F. Supp. 842, 848 (D.C. Nebraska 1975); *Holthaus* v. *Compton & Sons,* 514 F.2d 651 (8th Cir. 1975); *Long* v. *Ford Motor Company,* 496 F. 2d 500 (6th Cir. 1974), *modifying* 352 F.Supp. 135 (E.D. Mich. 1972); *Potter* v. *Goodwill Industries of Cleveland,* 518 F. 2d 864 (6th Cir. 1975); *Jackson* v. *City of Akron, Ohio,* 411 F. Supp. 680, 687 (N.D. Ohio 1976). See also: *Smith* v. *Anchor Bldg. Corp.,* 536 F. 2d 231, 233 (8th Cir. 1976) (housing) and *Williams* v. *Mathews Company,* 499 F. 2d 819, 826 (8th Cir. 1974) *cert. denied* 419 U.S. 1021, 95 S.Ct. 495, 42 L. Ed. 2d 294 (1974) (housing).

F. Supp. 1082 (D.C. Mass. 1968); *Smith* v. *Sol D'Adler Reality Company, supra.*

Reading *Jones* and *Smith*,[6] *supra,* together, it can reasonably be concluded that, once the burden of going forth with the evidence has shifted from the Plaintiff to the Defendant, the Defendant must come forward with evidence to establish that race was neither the sole reason nor even a partial consideration in refusing to rent an apartment to a Black person or in otherwise refusing to engage in a real estate transaction with a Black person. See: *Smith* v. *Anchor Bldg. Corp.,* 536 F.2d 231, 233 (8th Cir. 1976).

No one will admit outright that race is a factor in a consideration of a potential leasee or buyer. Plaintiffs submit, however, that something more than silence (as in *Harris* v. *Jones, supra*) or a mere pronouncement that race was not a consideration or the sole consideration (as in *Smith* v. *Sol D'Adler Reality Co., supra*) must be established in order for the Defendant to meet the burden satisfactorily. Addressing himself to this very point, Judge Sobeloff stated in *North Carolina Teachers Association* v. *Asheboro, City Board of Education,* 393 F.2d 736, 750 (4th Cir. 1968):

> ". . . That bland assertions by the School Board that its decisions were free of racial considerations do not suffice to discharge its burden . . ." (Emphasis added).[7]

Such is true, as well, in a case involving racial discrimination in housing in which the Black Plaintiff has gone

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[6] See also: *Williamson* v. *Hampton Management Company, supra; Zuch* v. *Hussey,* 394 F.Supp. 1028, 1047 (E.D. Mich. 1975); *Moore* v. *Townsend, supra* at page 485.

[7] In discussing the degree to which a school board must establish objectivity, once the burden of proof has shifted, the Court stated in *Baker* v. *Columbus Municipal Separate School District,* 329 F.Supp. 706, 720 (N.D. Miss., E.D. 1971):

> "The inference of racial discrimination arising from the circumstances of this case 'thrust(s) upon the School Board the

forward with the evidence and has established a "prima facie" case of discrimination. Certainly something more than the mere silence of the Defendant in this regard is required. See: *Harris* v. *Jones, supra.*

Moreover, a Court must be particularly careful to discount those considerations which, though apparently legitimate on their face, are merely "euphemistic refe ences" to actual or assumed racial distinctions. See: *Smith* v. *Board of Education of Morrilton School District No. 32,* 365 F.2d 770, 782 (8th Cir. 1966), lest the sophistication of the mode of racial discrimination be masked by what appear to be legitimate considerations and criteria. See: *Zuch* v. *Hussey, supra* at page 1051; *Smith* v. *Anchor Bldg. Corp., supra; United States* v. *Henshaw Brothers, Inc.,* 401 F. Supp. 399, 402 (E.D. Va. 1974).[8] Appellants submit that an examination of the record reflects that they established a "prima facie" case of discrimination against the Appellee thereby satisfying their burden; and that the

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burden of justifying its conduct by clear and convincing evidence.' Chambers v. Hendersonville City Bd. of Educ., supra, 364 F.2d at 192; Smith v. Concordia Parish School Board, Civ.No. 11, 577 (W.D.La. Sept. 3, 1970), p.9 appeal pending No. 30, 556; Rolfe v. County Board of Education of Lincoln County Tenn., 391 F.2d 77, 80 (6th Cir. 1968)." (Emphasis added).

In accordance: *Armstead* v. *Starkville Municipal Separate School District,* 325 F.Supp. 560, 570 (N.D. Miss., E.D. 1971); *Williams* v. *Kimborough,* 295 F.Supp. 578, 585 (W.D. Louisiana 1969). See also: *Chambers* v. *Hendersonville City Board of Education,* 364 F.2d 189, 192 (4th Cir. 1966); *North Carolina Teachers Association* v. *Asheboro City Board of Education,* 393 F.2d 736, 743, fn. 11 (4th Cir. 1968); and *Moore* v. *Board of Education of Chidester School District No. 59, supra.*

Appellants submit that the same principles apply in housing discrimination oriented litigation; and that the Appellee herein has the burden of justifying her conduct by clear and convincing evidence (which she did not satsfy—See: Discussion, *infra*) once the Appellants have satisfied their burden of going forth with the evidence (as they did—See: Discussion, *infra*).

[8] See also: *United States* v. *Gilman,* 341 F. Supp. 891, 903 (S.D. N.Y. 1972).

Appellee failed to satisfactorily rebut the same in order to avoid judgment herein. Accordingly, the final Order of the Court below, dismissing the Appellants' action and otherwise awarding judgment to the Appellee, was reversible error.

B. *The doctrine of* respondent superior

In *United States* v. *Romitti,* 363 F.2d 662, 666 (9th Cir. 1966), the Court stated:

> "In this connection it is important to notice a distinction between a principal's liability for his own negligence and his liability for the negligence of his agent. If a principal negligently employs a person who is incapable of performing the task for which he is hired, or negligently fails to exercise proper control over the agent's performance, the principal is liable for injuries due to the principal's own negligence—without regard to the doctrine of respondent superior. Witkin, summary of Calif. Law S.66, p. 438 (1960). See also 2 Harper & James, Law of Torts, S.S.26.1, 26.3 (1956). *But the liability imposed upon the principal by the doctrine of respondeat superior is vicarious and does not rest upon the principal's fault. The fault for which the principal is required to respond is not that of the principal but that of the agent, committed in the course of the principal's business. Thus, when respondeat superior liability is asserted, 'we are not * * * looking for the master's fault but rather for risks that may fairly be regarded as typical of or broadly incidental to the enterprise he has undertaken.'* 2 Harper & James, supra, S.26.7 p. 1376 (1956). '[W]e are no longer dealing with specific conduct but with the broad scope of a whole enterprise.'" (Emphasis added)

In the instant case as well, Appellee Silberman's liability is vicarious and does not rest upon her own fault,

though Appellants submit that her direction and approval in negotiations and transactions (as discussed infra) manifest direct liability on her part, above and beyond her vicarious liability. A principal is responsible for the illegal acts of those agents who violate the civil rights of persons in the course of the scope of their authority even though, strictly, they were not authorized. See: *Thomas* v. *Colorado Trust Deed Funds, Inc.*, 366 F.2d 140, 143 (10th Cir. 1966) where the Court held:

> "A principal is responsible for the fraudulent acts of an agent whom he has put in position to perpetrate the fraud complained of. Restatement, 2d. Agency, 261; Gleason v. Seaboard Ry., 278 U.S. 349, 49 S.Ct. 161, 73 L.Ed. 415; Amen v. Black, 10 Cir., 234 F.2d 12, remanded for dismissal pursuant to motion, 355 U.S. 600, 78 S. Ct. 530, 2 L.Ed. 2d 523; United States v. Fox Lake State Bank, N.D. Ill. E.D., 240 F.Supp. 720; J.C. Millett Co. v. Park & Tilford Distillers Corp., N.D. Cal.S.D., 123 F.Supp. 484."

See also: *Doody* v. *John Sexton & Company*, 411 F.2d 1119, 1122 (1st Cir. 1969) where the Court stated:

> "We note first, however, that the liability that Plaintiff is attempting to impose upon the Defendant is not responsibility for the loss of the contract, but only for the proximate consequences of the officers' wrongful act. The officers were hiring agents, within limits, and it is common experience for a principal to be held accountable in tort for unauthorized acts of an agent not too far removed from the scope of his authority, even though strictly, they were not authorized."

That an agent is dishonest or acts illegally and in violation of one's civil rights does not make him any less an agent. See: *Lyons* v. *Westinghouse Electric Corp.*, 235 F. Supp. 526, 533 (S.D.N.Y. 1964). See also: *McLeod* v.

Dean, 270 F. Supp. 855, 857 (S.D.N.Y. 1967) where the Court stated:

> "It is a well-settled rule that a principal or master may be held liable in damages for slander by his agent or servant where the latter was carrying out express orders, or acting according to express or implied authority, *or in discharge of his duties within the scope or usual course of employment . . .*" (Emphasis added).

For other cases supporting the aforementioned propositions see: *Johns Hopkins University* v. *Hutton,* 297 F. Supp. 1165 (D.C. Maryland 1968), *affirmed in part, reversed in part* 422 F.2d 1124 (4th Cir. 1970), *affirmed in part, reversed in part* 326 F.Supp. 250 (D.C. Maryland 1971); *Radiation Dynamics, Inc.* v. *Goldman,* 323 F.Supp. (S.D. N.Y. 1971), *affirmed* 464 F.2d 876 (2nd Cir. 1972); *In Re Sabre Shipping Corp.,* 299 F. Supp. 97 (S.D.N.Y. 1969).

In aforementioned agency principles have been incorporated specifically into cases dealing with violations of the provisions of the Fair Housing Act of 1968 and of an individual's civil rights as guaranteed by the Constitution of the United States and the Civil Rights Act of 1866; and they justify the Appellants' contenion that the Appellee, as the principal in the agency relation hip herein, is liable for the illegal actions of her represe tives.

In *Williamson* v. *Hampton Management Company, supra,* the Court held that the management Company was chargeable with the acts of its clerk who refused to consent to the lease or sublease of an apartment to two black women. See also: *Martin* v. *Bowers & Co.,* 334 F. Supp. 5 (N.D. Ill. 1971) *where the Court held that a lessor, sued under the Civil Rights Act, was liable for the acts of his agents, who did in fact discriminate against a Black applicant in the rental of housing, notwithstanding that the lessor could not be found to have any actual knowledge of the discrimination.*

In *United States* v. *Youritan Construction Co.*, 370 F. Supp. 643, 649 (D.C. Cal. 1972), *modified on other grounds* 509 F.2d 623 (9th Cir. 1975) the Court stated in this regard:

> "The discriminatory conduct of an apartment manager or rental agent is, as a general rule, attributable to the owner and property manager of the apartment complex, both under the doctrine of respondeat superior and because the duty to obey the law is nondelegable. United States v. Real Estate Development Corp., supra; United States v. Reddoch, supra; Williamson v. Hampton Mgt. Co., 339 F.Supp. 1146 (N.D. Ill. 1972); and the United States v. Mitchell, 335 F. Supp. 1004, 1006 (N.D. Ga. 1971).
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> * * *
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> *Owners and supervisors are responsible for the conduct of their agents; and injunction has been issued against principals for the unlawful conduct of their agents even where they instructed them to obey the law at regular staff meetings.* United States v. Mitchell, 335 F.Supp. 1004 (N.D. Ga. 1971)" [9] (Emphasis added).

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[9] In *United States* v. *Ridglea State Bank*, 357 F.2d 495, 499 (5th Cir. 1966) the Court, in addressing itself to the liability of a principal for an agent's misconduct, stated:

> "In a civil action to recover actual damages for an agent's misrepresentation done without intent to benefit his employer, liability is imposed upon the employer, not only because the third party reasonably thought that the agent was acting for the employer, see McCord v. Western Union Telegraph Co., 39 Minn. 181, 39 N.W. 315 (1888), *and perhaps because the imposition of liability will encourage more careful supervision of employees by employers*, see Morris, The Torts of an Independent Contractor, 29 Ill. L.Rev. 339, 341 (1934), *but also because the third person has suffered loss which the employer is better able to bear and to spread then is his agent*, see Gleason v. Seaboard Air Lines R'y, supra. This last reason has been called 'the real reason for employer's liability.' Baty, Vicarious Liability 154 (1916)."

See also: *Marr* v. *Rife*, 503 F.2d 735, 740-742 (6th Cir. 1974); *United States* v. *Real Estate Development Corp.*, 347 F.Supp. 776, 785 (N.D. Miss. 1972); *Zuch* v. *Hussey*, *supra* at pages 1052-1053. The same principle is true herein. The discriminatory conduct of the seller's son and daughter is attributable to the owner of the house, the Appellee (the principal), "both under the doctrine of *respondent superior* and because the duty to obey the law is non-delegable." *Ibid.* See also: *United States* v. *Real Estate Development Corp.*, *supra* at page 784; *United States* v. *L. & H. Land Corp.*, 407 F.Supp. 576, 580 (S.D. Florida 1976).

II.

The Evidence

A. *Appellants' Case*

George and Delores Duckett, the Appellants herein, are Black American citizens. See: Stipulation of Agreed Upon Facts, Paragraph #1.

On or about June 22, 1975, Appellants approached Teitelbaum Realty located and situated at 73-15 Main Street, Flushing, Queens, New York (See: Transcript at page 3) and spoke with one Peter W. Smetana, a broker within and employed by said Realty Company (See: Transcript at page 3), about purchasing a house in the Kew Gardens area of Queens. See: Transcript at pages 6, 45. Specifically, Appellants advised Mr. Smetana that they were looking for a brick house west of Main Street, in Kew Garden Hills, Queens, New York. See: Transcript at page 45. The area is an overwhelmingly white residential neighborhood. See: Transcript at pages 28-31. See also: Plaintiff's Exhibit #1 and Plaintiff's Exhibit #2.

Approximately one week later (on or about June 29, 1975) after some initial delay in effecting the viewing of some realty in the designated area, See: Transcript at page 46, the Appellants did arrange to see the premises located and situated at 141-01 77th Avenue, Flushing, Queens, New York.[10] See: Stipulation of Agreed Upon Facts, Paragraph #3. Said property was owned by Appellee Eve Silberman, a white person and the named Defendant below. See: Stipulation of Agreed Upon Facts, Paragraph #2. Just prior to the viewing, Mr. Smetana advised the Appellants that the premises, while basically a fine house, did have some problems, particularly with leakage of water. See: Transcript at pages 6, 46-47.

The Appellants were advised that the asking price for the premises was $55,000.00 (fifty-five thousand dollars).[11] See: Transcript at pages 7-8, 47. Mr. Smetana was advised by the Appellants that, because of the work which needed to be done, he desired to have an appraiser view

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[10] Mr. Smetana was acting as the brokerage agent for the seller herein with the approval of Mrs. Ravelle Brickman, who is the daughter of the Appellee and who was acting by words and deeds as agent for her mother (who at the time was in Minnesota). See: Deposition of Ravelle Brickman (in evidence) at pages 4-11. See also: Stipulation of Agreed Upon Facts. In additon to Mrs. Brickman, the Appellee's son was acting for and on her behalf in the negotiations. See: Stipulation of Agreed Upon Facts. Both Mrs. Brickman and the Appellee's son are white. See: Stipulation of Agreed Upon Facts.

[11] Initially, the property was placed on the market with an asking price of $60,000.00 (sixty thousand dollars); but said asking price was lowered to $55,000 (fifty-five thousand dollars), prior to the time at which the Appellants demonstrated an interest and viewed the property. Apparently, the asking price was lowered when efforts at securing a price for the premises failed on several occasions prior to the viewing of the house by the Appellants and the Appellee and her representatives concluded that, because of the condition of the house, it had been initially and substantially over-priced. See: Deposition of Ravelle Brickman (in evidence) at pages 12-13; 16. See also: Discussion *infra*.

the property so that they (the Appellants) could make an intelligent offer. See: Transcript at pages 47-48.

Thereafter on approximately July 2, 1975 the appraiser did view the property (in the presence of Mr. Duckett and Mr. Smetana). On the following Saturday, Mr. Duckett did get in touch with Mr. Smetana and made an offer of $42,000.00 (forty-two thousand dollars) for the purchase of the property. See: Transcript at pages 10, 48.

Mr. Smetana indicated to Mr. Duckett that he would convey the offer to the seller; and that he would get back to him relative to the same. See: Transcript at page 49.

Several days later, on or about July 13, 1975, Mr. Duckett contacted Mr. Smetana since he had not heard from him as he had expected. Mr. Smetana advised Mr. Duckett that the Appellee had not made a decision relative to his offer but that he would get back in touch with him shortly. See: Transcript at pages 49-51.

Thereafter, within a few days, Mr. Smetana advised Mr. Duckett that he had met with the Appellee's daughter, Mrs. Ravelle Brickman, who was acting for and on behalf of the former. See: Transcript at page 52; Deposition of Mrs. Ravelle Brickman (in evidence) at pages 4-8. See: Stipulation of Agreed Upon Facts. He further advised Mr. Duckett that race had entered into the discussion. See: Transcript at page 52. In point of fact, Mr. Smetana testified that he was asked by Mrs. Brickman whether the persons who proposed the offer (the Appellants herein) were Jewish; and when he indicated that they were not, she inquired about their race. He testified that he did advise Mrs. Brickman that the Appellants were "colored." [12] See: Transcript at pages 11-13.

[12] Mrs. Brickman, in her testimony (by deposition) corroborates the existence and substance of said conversation although she con-

In addition to advising Mr. Duckett of the foregoing, he indicated to him that the new asking price was $49,000.00 (forty-nine thousand dollars). See: Transcript at page 52.

At the conclusion of the conversation, Mr. Duckett did advise Mr. Smetana that he would get back in touch with him on the next day. He did so; and he offered $44,000.00 (Forty-four thousand dollars) for the purchase of the house. See: Transcript at page 53.

Shortly thereafter, Mr. Duckett did raise his final offer to $45,000.00 (forty-five thousand dollars). See: Transcript at page 54. Mr. Smetana, after checking, advised Mr. Duckett that the daughter was in agreement with the $45,000.00 (forty-five thousand) dollar price; but that her brother (and the son of the Appellee), who was also acting for and on behalf of the Appellee, had requested that Mr. Smetana hold Mr. Duckett off,[13] See: Transcript at page 54, so as to allow them (the seller and her agents) more time to secure another purchaser. Thereafter and within a very short period of time, Mr. Smetana advised Mr. Duckett that the price was acceptable. See: Transcript at page 54.

Immediately upon learning of the same, Mr. Duckett contacted Thomas Hoffman, Esq. (who is white) for legal assistance relative to the purchase of the house. At that time, Mr. Duckett advised Mr. Hoffman that Mr. Smetana, the broker, had agreed to fix the faulty bathroom in the

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tends that Mr. Smetana initiated the same rather than herself, as the broker testified. See: Deposition of Mrs. Ravelle Brickman (in evidence) at pages 17-18. The significant point is that the subject was broached and the racial identification of the Appellants herein, in fact, made known to an agent of the Appellee.

[13] Mrs. Brickman, by her testimony, corroborates the fact that her brother sought a delay in advising the Appellants herein that the price was acceptable. According to Mrs. Brickman, he did so in order to attempt to find another purchaser. See: Testimony of Mrs. Ravelle Brickman (by deposition) at page 34.

house and to guarantee the appliances to be working at the closing of title. See: Transcript at page 55. See also: Testimony of Mr. Smetana at page 17.

Upon being contacted by Mr. Duckett and advised of who the broker in this matter was, Mr. Hoffman contacted the broker and learned that Mr. Murray, the attorney for the Appellee, was out of the City; but that Mr. Smetana's son, who was working at Mr. Murray's office, would be handling the matter until he got back. However, when Mr. Hoffman did contact Mr. Murray's office to speak with Mr. Smetana's son about the same, he was advised that he would have to wait until Mr. Murray returned before any discussion relative to the matter could take place. See: Transcript at pages 66-67.

Upon his return, Mr. Murray advised Mr. Hoffman that he did not have a certified copy of the deed; and that, before he would draft a contract relative to the sale of the house, he wanted to secure the same. See: Transcript at page 67.

Early in September (on September 2, 1975, a Tuesday), Mr. Hoffman was advised by Mr. Murray that he finally had drafted the contract and that he was forwarding the same to the Appellee in Minnesota. Hoffman requested that Mr. Murray send him a copy of the contract contemporaneously in order to avoid any further delay. See Transcript at pages 67a-68. During the conversation which followed said request, Mr. Hoffman and Mr. Murray engaged in discussion respecting the terms of the drafted contract; and Mr. Hoffman requested that a clause be included protecting the buyers from assuming risk of unintentional damage to the house from contract closing to title closing (per a standard agreement); that the cost of the repair of the bathroom and kitchen leaks be assumed by the Appellee, and that the appliances be delivered in

working condition. See: Transcript at page 69. Mr. Murray advised Mr. Hoffman that the deal was off; and Mr. Hoffman requested that, before Mr. Murray call the deal off, he check with the Appellee. See: Transcript at pages 69-70.

Several times thereafter, Mr. Hoffman called Mr. Murray; but Mr. Murray maintained that he still had no answer. In point of fact, Mr. Murray never called Mr. Hoffman in this respect; and it was only Mr. Hoffman who initiated any discussions in this matter and otherwise attempted to pursue the contract matter to its conclusion once the Appellants had made their firm offer of forty-five thousand dollars ($45,000.00). See: Transcript at pages 70-71.

During this period, Mr. Hoffman did speak with both Mr. Duckett and Mr. Smetana. Mr. Hoffman did advise Mr. Duckett that the conditions which he had requested were apparently being rejected. Mr. Duckett did speak with Mr. Smetana who indicated to Mr. Duckett that, per an insurance policy, the problems could be resolved. See: Transcript at pages 20, 56. Mr. Hoffman did advise Mr. Duckett that the insurance policy solution raised some legal problems. See: Transcript at page 56. Mr. Hoffman, himself, did speak with Mr. Smetana who indicated that he would look at the house at the contract closing and then at the title closing in order to assure the integrity of the property. See: Transcript at pages 21, 72. Mr. Hoffman advised Mr. Murray of the same, per telephone conversation; but apparently Mr. Murray advised Mr. Hoffman that he would not go along with it. See: Transcript at page 72. During these several days of discussion, Mr. Duckett advised Mr. Hoffman that he should withdraw the clauses as conditions to the contract closing. See: Transcript at pages 56-57; 59-60.

On September 19, 1975, Mr. Hoffman did call Mr. Murray and advise him that his client no longer desired to pursue the contract conditions; and that his clients were ready, willing and able to purchase the house at the agreed upon forty-five thousand dollar price ($45,000.00). See: Transcript at page 72. In addition, on or about the same date, Mr. Hoffman advised Mr. Smetana of the same; and he (Mr. Smetana) d'd advise Mr. Murray of the same shortly thereafter. See: Transcript at pages 22-23.

Mr. Murray advised Mr. Hoffman that he would get back to his clients and that he would be back in touch with Mr. Hoffman, shortly, See: Transcript on page 72.

Finally, on October 3, 1975, Mr. Hoffman did have another conversation with Mr. Murray in which he advised Mr. Murray that he did not understand the problems in this matter since his clients were ready, willing and able to purchase the property without condition. See: Transcript at page 73.

Mr. Murray indicated to him that a new person was interested in purchasing the house. See: Transcript at page 23. Mr. Hoffman told Mr. Murray that he was surprised about the same. Furthermore, he advised Mr. Murray that he was authorized (as he was) to match a bona fide offer on the property. Finally, he advised Mr. Murray that he would start confirming things in writing (since the matter was apparently deteriorating in a rather suspicious manner). See: Transcript at page 73. In point of fact, Mr. Hoffman did confirm the conversation of October 3, 1975 in which he had reiterated the fact that previous to that time (on September 19, 1975) he had withdrawn the contract clause conditions per his clients direction. Furthermore, he set forth his clients desire to meet any bona fide purchase offer made by the newly

learned of third party. See: Letters of October 3 and October 7, 1975, attached to Agreed Upon Stipulation of Facts.

Notwithstanding the Appellants' readiness and capacity to purchase the house in question on September 19, 1975 and their advisement of the same to the Appellee's attorney and broker (through their attorney) on September 19, 1975 and notwithstanding Mr. Hoffman's reiteration of the same on October 3, 1975, the house was not sold until October 8, 1975; and then, to Menahem Mendel Beer, a white man (See: Stipulation of Agreed Upon Facts, Paragraph) for the price of $46,000.00 (forty-six thousand dollars).

Most significant is the fact that, notwithstanding that Mr. Beer paid $46,000.00 (forty-six thousand dollars) and supposedly agreed to take the house as is, without contract conditions attached thereto,[14] at the contract closing he did raise certain of the same conditions which the Appellants' had requested; and was permitted to withdraw the same without prejudice to his ability to purchase the house. See: Deposition of Menahem Mendel Beer at pages 62-64, 70-73. Furthermore, the guarantee of the appliances, which was raised by the Appellants as a possible contract clause and thereafter rejected by the Appellee and ultimately withdrawn by the Appellants so as to permit them to proceed with the purchase, was included in Mr. Beer's contract sale. See: Contract of Sale, attached to Agreed Upon Stipulation of Facts. See also: Deposition of Menahem Mendel Beer at pages 64-65. So too, was the condition related to maintenance of the property from time of con-

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[14] See: Deposition of Ravelle Brickman (in evidence) at page 30 where she noted in this regard:

"A: I learned from Mr. Murray at some point in September that some other people were interested in buying the house for a thousand dollars more and absolutely as is with no conditions."

tract closing to the date of title closing. See: Deposition of Menahem Mendel Beer (in evidence) at pages 70-73. See also: Contract of Sale, Indenture, and Mortgage attached to Stipulation of Agreed Upon Facts.

Appellee seeks to minimize the conditions included in the Beer sale of contract as inadvertent and otherwise meaningless. Those conditions nevertheless exist; and apparently Appellee admits the same. She has no other alternative in view of the fact that the conditions are set down in writing and that written document is in the record. The contract of sale reflects that Mr. Beer, the ultimate purchaser (who is white), did secure contract conditions which the Appellants had asked for (after the price was agreed upon) and which were rejected as out of hand. Ultimately the Appellants withdrew the conditions (before Mr. Beer appeared in the picture); but to no avail.

The assertion by Appellee that the conditions were inadvertently included in the Beer contract is just that—an assertion. There is no evidence whatsoever that the conditions were inadvertently included within Mr. Beer's sale of contract; and there is no such evidence because an effort at producing such would be foolish. The conditions are there in writing in the contract; and they were obviously included therein where they were held to be not only not acceptable where the Appellants were involved but a barrier to completing the transaction (even after the Appellants withdrew the conditions).

It cannot be underemphasized, as well, that Mr. Beer, the ultimate purchaser, was permitted to raise certain contract conditions at the closing and allowed to withdraw the same, without prejudice, unlike the Appellants.

It is noted in West's McKinney's Forms, R.P.P., at page 13 that with respect to contract negotiations:

> "Parties are now ready through their attorneys to work out the terms of the contract. In the average case, each party usually takes a very active hand in 'hammering out' the details of such contract."

Once the price of the premises in question herein was agreed upon between the Appellants and Appellee, in this average real estate transaction, the Appellants were foreclosed from "hammering out" the details of the sale of contract, unlike the ultimate purchaser who was given that opportunity right up to the very date of contract closing. The only apparent reason for this differential treatment is the respective races of the parties—the Appellants are Black and the ultimate purchaser is white.

The terms of Mr. Beer's contract, as mainfested in the document in evidence, as well as the differential treatment accorded the Appellants in the contract negotiation, coupled with the acknowledged racial identification of the Appellants during the process of sale and negotiation, established a prima facie case of discrimination, unrebutted.

The evidence is manifest that Mr. Beer was provided different and more ample opportunity to purchase the house; and that the Appellants were prematurely foreclosed from concluding a deal which had otherwise been promised.

Thus, Appellants submit that they established, by and through their case (including the testimony by deposition of Ravelle Brickman and Menahem Mendel Beer), that they were ready, willing and able to purchase the property in question, without condition and for a stated price; but they were denied the same for no apparent reason, save for their race. The burden thus shifted to the Appellee to rebut the prima facie case; and the Appellee failed significantly in that respect.

B. ***Appellee's Case***

The Appellee presented no evidence whatsoever to rebut the Appellants' prima facie case, contending that the Appellants did not carry their burden by and through the evidence presented in their cases in chief (including the testimony given at the hearing on the application for the preliminary injunction and the testimony submitted to the Court by way of and through depositions).

C. ***Rebuttal of appellee's position that the appellants did not carry their burden, by and through the evidence presented in their case and, accordingly, failed to make out a* prima facie *case.***

In its initial decision in this matter (wherein the Court denied the Appellants' application for a preliminary injunction), the Court, explicitly noted several concerns it had with the Appellants' case to that point, acknowledging, in effect, the Appellee's position that the Appellants had not met their burden. Appellants submit that the following discussion undercuts and pierces those concerns and ultimately negates the argument that the Appellants failed to make out a prima facie case of actionable racial discrimination under the Civil Right Acts of 1866 and 1968 (42 U.S.C. Sections 1982 and 3601 *et. seq.*).

1. The Price

Among other things, the Court expressed concern about the fact that the Appellee lowered the price for the sale of the premises herein to the Appellants, asserting that such manifested an apparent evidentiary contradiction and inconsistency with the Appellants basic claim that the Appellee ultimately refused to sell the premises to the Appellants because of their race. See: Memorandum and Order at pages 10-11. See also: Supplemental Memorandum and Order at pages 2-3.

Recognizing the fact that the purchase price was ultimately reduced, nevertheless such is hardly inconsistent with the basic claim herein when the entire record is viewed as a whole. The Appellee's own daughter and agent, Ravelle Brickman, acknowledged that the premises was overpriced, initially, at $60,000.00 and that she recognized the same early on in her efforts to sell said property. The evidence in this respect reflects that, even befor the Appellants sought to purchase the premises, the price for the same had been lowered primarily because of several low bids, to that date, and the recognition by the Appellee and her agents that the premises was not in satisfactory condition.

"Q. Subsequent to December of '74 and prior to Mr. Duckett's entering the scene, was the $60,000.00 figure ever reduced?

A. I accepted realistically that we weren't going to get $60,000.00 I hoped for $55,000.00.[15]

Q. Did you ever tell Mr. Smetana to reduce the $60,000.00 offer?

A. To $55,000, yes.

Q. When was that?

A. In February.

Q. Subsequent to February of '75 the figure was $55,000. as to what it was being offered for?

A. Yes."

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[15] Mr. Smetana, the real estate broker in this matter, apparently acknowledged the over-priced nature of the house to Mr. Duckett, himself, when he noted that the price herein (at $55,000.00) would come down after he (Mr. Duckett) made an offer.

Q. Was there a price mentioned?

A. Yes. He said the asking price was $55,000 but people don't always get their asking price and indicated I probably could get the house for $50,000.

See: Transcript at page 47.

See: Transcript at pages 12-13.

Continuing, Mrs. Brickman noted:

"Q. When Mr. Smetana called you regarding the new prospective purchaser, I believe you stated in June of '75, what was said to you, and what was said to him by you and from him to you, in form and substance?

A. He said that someone was interested in the house, that the offer was in the low 40s. He asked whether I would come down in price. I said at this point I would consider it because the house was becoming a major liability, but I would not come down to 42 and 40.

Q. You would come down from 55?

A. From the 55."

See: Transcript at page 16.

It is apparrent that the Appellants price was accepted at the time and place it was, notwithstanding their race, because the house was becoming a liability. Even at that point, however, there is evidence that the son (and agent) of the Appellee requested from the broker that he delay ten days in advising the Appellants of the acceptability of their offer in order to allow the Appellee and her agents more opportunity to sell the house to others. (See: Discussion, *supra*).

Thus, it is apparent that the acceptance of the Appellants offer and the lowering of the price had to do with market place realities notwithstanding the racial factor herein. What cannot be otherwise eliminated and disputed is that racial considerations were raised and were a factor, if not the sole factor, in the entire transaction, other factors (such as market place realities), aside. Otherwise, why would it (race) have been broached, as admittedly, it was.

2. Withdrawal of Conditions

Apparently the Court was troubled, as well, by the testimony of Mr. Smetana that September 19, 1975 or thereabouts, was the date on which Mr. Hoffman notified him that the terms, which the Appellants had requested be in the contract, were withdrawn. See: Memorandum and Order (relative to application for preliminary injunction) at pages 6 and 11. See also: Supplemental Memorandum and Order at pages 3-4. Notwithstanding the Court's maximization of an apparent contradiction of Mr. Smetana' testimony in this respect, a reasonable and fair reading of the entire record reflects that, for all intent and purposes, the contradiction should have been minimized; for Mr. Smetana was absolutely sure that the conversation with Mr. Hoffman, in which he testified that Mr. Hoffman advised him that the conditions were withdrawn (and he shortly thereafter conveyed the same to Mr. Murray), took place during the period of time when Mr. Smetana was on vacation; and he was not on vacation on October 3, 1975. It is apparent from Mr. Smetana's testimony that the conversation took place on a Friday; and a Friday during the period of time when he was still on vacation.[16] In that regard he stated:

Q. On or about September 19th, do you recall having a conversation with me regarding these issues:

A. Yes.

Q. What was the conversation you had with me in words or substance?

A. You told me that day that your client was prepared to sign a contract without the provisions, or without the stall shower being repaired and

[16] September 19, 1975 was a Friday; and the Court could have and should have taken judicial notice of the same.

without the arbitration issue being any longer an issue.

Q. Did you communicate—strike that.

A. As far as I was aware of there were no other open issues but as I was on vacation from September 1st to September 23rd, and I had very little or no communications from either party at this point. As a matter of fact I have never received a letter or any other correspondence that went on between the parties."

See: Transcript at page 22.

Continuing, Mr. Smetana testified:

"Q. After the 10th of September, were you having discussions with me?

A. Yes.

Q. What was the nature of those conversations?

A. your final conversations that the feeling you were ready to buy the house, your client was ready to buy the house.

Q. You were communicating that to Mr. Murray.

A. During discussions I had with Mr. Murray I told him I felt your client was prepared to buy the house. Yes."

See: Transcript at pages 27-28. On cross examination, Mr. Smetana, while acknowledging that anything in life is possible, maintained the certainty of date notwithstanding the pressing cross examination by Appellee's counsel and the Court. He stated:

"Q. Mr. Hoffman gave you a date, September 19th. Are you sure of that date or could it have been a little later or sooner?

A. To the best of my knowledge and recollection, I am sure of that date.

Q. Did you make a notation?

A. I seem to recall this was the last day of my vacation and it was a Friday.

Q. But you made no notation?

A. That's correct.

The Court: Were you home or at the office?

The Witness: I was home and I know it was close to 5:00 o'clock because I had to pick someone up at the subway.

* * *

By Mr. Murray:

Q. I refer to Exhibit B, letter addressed to me dated October 3rd, since it is in the exhibits—

Mr. Hoffman: He will have to show that he received that.

Mr. Murray: I want to refresh his recollection.

Q. Read this letter and see if it helps you refresh your recollection?

Mr. Hoffman: That is not a letter by Mr. Hoffman.

The Court: It doesn't make any difference. He can show him a piece of toilet paper if it will refresh his recollection. It is all right.

Q. Please read that letter and see if that helps refresh your recollection as to the date you were informed that Mr. Hoffman withdrew those two conditions.

A. I am sorry, I am reading the letter.

Q. I am sorry. You read the letter.
A. I have read it.

The Court: Does that refresh your recollection?

The Witness: Only I see here the date is October 3rd.

Q. Could it have been that date or close to that date?
A. Everything we are discussing is close to that date.

Q. Could it have been that date rather than the date the Mr. Hoffman spoonfed you on the stand?

Mr. Hoffman: I object.
The Court: Sustained.

Q. Could it have been that date—

Mr. Hoffman: Objection. I didn't mention September 19th. He did it.

A. I am getting very confused. I think the first time I was told about this again—context was September 19th. On the other hand—I couldn't recollect either date.
Q. It could have been another date, is that what you are saying?

Mr. Hoffman: He answered that.
The Court: Overruled.

Q. It could have been that date? Is that possible or close to that date?
A. Everything was close to that date.

Q. Are you saying it could have been close to that date or it could not.

The Court: October 3rd was a Friday.

A. My original recollection was that it was in September, Mr. Murray. My original recollection is that it was in September.

Q. My question is could that conversation have taken place that week rather than the week you have testified to, with the aid of the exhibit I showed you that Mr. Hoffman produced?

Mr. Hoffman: Let him answer the question.
The Court: This is cross-examination. Could it have been on October 3rd?

Q. It is possible?
A. *There is a possibility that I was wrong in my original testimony. It could possibly have been, but I don't think so.*" (Emphasis added).

See: Transcript at pages 35-39. On re-direct, Mr. Smetana reconfirmed his belief that the conversation in question took place on Friday during his vacation (which ended on September 23, 1975). He testified:

Q. The famous "September 19th' conversation, when did you return from your vacation?

The Court: September 23rd.[17]
The Witness: Right.

Q. Isn't it a fact that you recall the date because you remember you were still on vacation, isn't that correct.

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[17] See: Transcript at page 22 where Mr. Smetana noted:
"A: As far as I was aware of there were no other open issues but as I was on vacation from September 1st to September 23rd, and I had very little or no communication from either party at this point. As a matter of fact I have never received a letter or any other correspondence that went on between the parties."

Mr. Murray: Objection.
The Court: Sustained.

Q. Do you recall whether or not this conversation was while you were on vacation?

Mr. Murray: Objection.
The Court: I will allow it.

A. It is so difficult because Friday is my day off, since I work the weekends. I know it was on a Friday. I am 100 percent sure it was on a Friday now with all this cross questioning.

Q. This deposition, page 35—
A. I remember what I said, I said sure as shooting.

Q. And you remember you said: I was still on vacation.
A. Yes.

Q. Were you on vacation on October 3rd?
A. On October 3rd, I was off, not on vacation, no, sir."

See: Transcript at pages 43-44.

It is submitted that a reading of Mr. Smetana's testimony (taken as a whole), otherwise, to conclude that the conversation took place after September 19, is just unfair and unreasonable.

Mr. Smetana's testimony, relative to the September 19, 1975 date, was corroborated[18] by the testimony of Mr.

[18] The corroborating nature of the testimony of Mr. Hoffman, Mr. Smetana and Mr. Duckett is evidenced not only on this point but on several other points detailed in the discussion of the evidence set forth heretofore.

Hoffman, himself, notwithstanding that Mr. Hoffman did not write a letter in this respect until October 3, 1975.[19]

In that regard (as the discussion, with attendant transcript references, set forth) Mr. Hoffman testified that he did withdraw the clauses of guarantee which he proposed to be in the contract on September 19, 1975, per the instructions from his client (see: Testimony of Mr. George Duckett); and that he further advised Mr. Murray that his client was ready, willing and able to purchase the house for $45,000.00 (as previously agreed upon) without further delay. Mr. Murray indicated to Mr. Hoffman that he would get back in touch with him after speaking with the seller. On October 3, 1975 Mr. Hoffman did call Mr. Murray and learned that a new buyer was in the picture. It was at this time that Mr. Hoffman became alarmed at what was taking place and indicated to Mr. Murray that he felt that this conversation should now be confirmed in writing. Thus on October 3, 1975 he wrote

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[19] It was pointed out by the Court that it found that, because the Complaint was drawn to reflect that the conditions were not "finally" withdrawn until October 3, 1975, said Complaint is inconsistent with the representations otherwise asserted and made by the Plaintiffs herein. However, it is not insignificant that the Complaint manifests "finally" only to the extent that the withdrawal of the conditions were finally put in writing on October 3, 1975, although its finality, in the truest sense, was there when the conditions were withdrawn, orally, on September 19, 1975. Mr. Hoffman, by and through his testimony, addresses himself to the delay. Apparently he was as surprised as anyone when on October 3, 1975 he was advised that another purchaser was then in the picture; and felt, at that point, that certain suspicious transactions were taking place such that formality (as opposed to finality) need be infused into the process at that time. In retrospect, perhaps the formality infused on October 3, 1975 (and as pled) was a mistake; but nevertheless it is now explained and explained reasonably. This Court should not interchange the previously asserted finality of the withdrawal of the conditions on September 19, 1975 for the subsequently manifested formality of the October 3, 1975 correspondence wherein the finality was reiterated.

a letter to Mr. Murray confirming the matters which had been discussed on that date but had been raised previous thereto on September 19, 1975.

Thus we have the uncontradicted testimony of two witnesses in Appellants' case (Mr. Smetana and Mr. Hoffman) plus the testimony of one of the Appellants (Mr. George Duckett) who stated that he was advised of certain things by Mr. Hoffman, relative to the requested contract terms, on or about September 19, 1975, at which time he requested that Mr. Hoffman withdraw the same and advise the seller's attorney of his willingness to conclude the purchase.[20] While the statements said to Mr. Duckett by Mr. Hoffman are not probative as to the truth or falsity of Mr. Hoffman's testimony, they certainly reflect the state of mind of the actors herein. When Mr. Duckett's testimony is coupled with the testimony of Mr. Hoffman and Mr. Smetana, one must conclude that the preponderance, if not the overwhelming weight, of the evidence in this regard reflects that the conditions proposed to be included within the contract closing were withdrawn on September 19, 1975; and that thereafter such withdrawal was reiterated again on October 3, 1975 both verbally and in writing by Mr. Hoffman as a consequence of the relevation about the new purchaser.

Perhaps the most significant aspect of the record, in this respect, is the total absence of evidence, either verbal or by affidavit, from the Appellee or her witnesses (most notably her attorney) that Mr. Hoffman and/or others did not notify Mr. Murray of the withdrawal of the conditions on or about September 19, 1975, as testified to by Mr. Hoffman, Mr. Smetana and Mr. Duckett.

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[20] According to the testimony, Mr. Duckett was earning a salary of $23,000.00 (twenty-three thousand dollars) at the time; and was engaged in negotiating a mortgage for the purchase of said house. See: Transcript at pages 57, 59.

Under the federal rules of evidence, relative to civil litigation, when a person is available to testify regarding evidence which is otherwise harmful to that person and the person elects not to so testify, the presumption is that said person does not have testimony or other evidence to contradict the unfavorable evidence submitted into the record to that point. Thus we must presume that Mr. Murray, who was available to testify, elected not to do so because his testimony would not contradict the Appellant's evidence (as discussed heretofore) that the contract conditions were withdrawn and that he was so notified thereof (along with the fact that Mr. Duckett was ready, willing and able to conclude the purchase of the premises for the previously agreed upon forty-five thousand dollar price) on September 19, 1975.

The Appellee argues that the presumption in civil actions, relative to the non-testimony of an available witness to contradict evidence otherwise harmful to the Appellee is not operative herein since the Appellee did not have any money to secure another attorney in order to allow her attorney, who supposedly had in his possession testimony to contradict that of Mr. Hoffman, Mr. Duckett and Mr. Smetana relative to the September 19, 1975 date, to testify. Such reasoning is just not a basis for negating the operation of the presumption. First and foremost, there is no evidence in the record (or otherwise) that the Appellee did not have any monies to secure another attorney in this respect. Furthermore, there is no basis for even assuming that such was necessary in view of the situation herein where Mr. Hoffman testified relative to said issue without any problem in that respect. Certainly, Mr. Murray could have taken the witness stand; and otherwise state for the record testimony relative to the issue in question (an issue which has some material value to the basis of the claim herein).

Moreover, even assuming that there were problems technically in Mr. Murray testifying in this matter, that problem, in view of the materiality of his testimony and his failure relative thereto, cannot be answered with a shrug; and the presumption which operates cannot be avoided because of finances.

There is no evidence whatsoever to rebut the testimony of Mr. Hoffman relative to the issue of the September 19, 1975 date (as such was additionally testified to by Mr. Smetana and Mr. Duckett) notwithstanding that the Appellee, through her attorney, supposedly possessed the same.

Certainly, the Appellee should not be able to contest the credibility of the September 19, 1975 (as she apparently is doing) without producing some evidence, in some form or another, to contradict the substantial evidence presented by the Appellants in this regard. Her failure in this respect necessarily throws into operation the negative inference, to wit: the Appellee does not have such evidence. See: Rule 302 of the Federal Rules of Evidence where it states:

> "In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law."

See also: Fish on New York Evidence, Section 1126 at page 551 where the author notes that under New York law:

> "In both civil and criminal cases the failure of a party to produce available evidence, or to call as a witness an available person under his control who is in a

position to testify concerning a material fact, creates an adverse inference." Footnotes omitted.[21]

In view of the foregoing, it is respectfully submitted that a negative presumption (and/or inference) must operate in this matter as a consequence of the Appellee's refusal to produce evidence or other testimony, supposedly in her possession or that of her attorney, to rebut the position asserted and evidentiarily established by the Appellants specifically as to the notification of the date of withdrawal of contract conditions and the readiness, willingness and ability of the Appellants to purchase the premises in question for the previously agreed upon price (said notification being made to Mr. Smetana and Gerald Murray, Esq. on September 19, 1975).

3. Knowledge of Appellant's Race

The Court initially noted that there was no proof presented at the preliminary hearing herein that the Appellee knew or should have known of the religious and racial questions allegedly raised by the Appellee's daughter, Mrs. Brickman, in her telephone conference with the real estate broker, Mr. Smetana. See: Memorandum and Order at page 10. However, Mrs. Brickman's testimony during her deposition (now in evidence) reflects that she did raise the issue of the Plaintiff's race with her mother and brother early on in the negotiations relative to the purchase of the property herein questioned by the Appellants. In that regard she testified:

"Q. Did you have any conversations from June '75 and October '75 with your mother or your brother regarding Mr. Duckett's race?

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[21] See also: *Fish, supra,* Section 1126 at pages 552-553 which sets forth the extent to which the adverse inference give rise to a presumption, etc.

A. Yes.

Q. When was the conversation?

A. In August.

Q. What, to the best of your recollection, was said to you and said by you to them?

A. My brother and I agreed that it would be a very nice thing for Kew Gardens Hills to have a black family."

See: Deposition to Mrs. Ravelle Brickman (in evidence) at page 31.

Furthermore, it is apparent that, not only did the brother know of the race of the Appellants but that after learning of the same, he sought to have the transaction delayed in order to attempt to secure other purchasers. The testimony in that respect holds:

"A. In August my brother asked Mr. Smetana to hold up on Mr. Duckett's offer for ten days to see if any better offer could be found, and if no better offer had been found, he would sell the house to Mr. Duckett at his price in ten days.

Q. Did you have any conversations from June '75 and October '75 with your mother or your brother regarding Mr. Duckett's race?

A. Yes.

Q. When was that conversation?

A. In August.

Q. What, to the best of your recollection, was said to you and said by you to them?"

See: Deposition of Ravelle Brickman (in evidence) at page 34.

Under the theory of vicarious liability, the personal knowledge of the Appellee (the principal) is not necessary since it is imputed to her by and through the acknowledged understanding by her agents (her son and daughter) of the race of the Appellants. See: Discussion of Law, *supra*. However as the aforementioned evidence reflects, it is apparent that the Appellee, herself, had actual knowledge of the race of the Appellants as a consequence of the conversation relative thereto with her son and daughter. See: Testimony of Ravelle Brickman, *supra*, in this regard.

Thus the Court's concern in this respect was unfounded; and certainly not a basis for denying the Appellants relief herein.

4. The Existence of Another Purchaser

Finally, the Court was apparently troubled by the fact that Mr. Smetana testified (over the objection of Appellants' counsel) that, in his opinion, the deal herein fell through because of the existence of another buyer. Certainly, Mr. Smetana's opinion and conclusion in this regard has no bearing on what the evidence contains and the conclusions which this Court must arrive at based on law and the appropriate burdens of proof.

Certainly, another buyer came along.[22] There is no dispute about the same. The question herein is why was it

[22] Interestingly, according to the testimony of one Menahem Mendel Beer, given by deposition and otherwise submitted into the record, he was not aware of the existence of the Appellee's premises and did not pursue the purchase thereof until the end of September, 1975. (See: Deposition of Menahem Mendel Beer (in evidence) at pages 13, 14, 28, 29.) Moreover, Mr. Smetana spoke to Mr. Murray on several occasions, after he was notified that the conditions had been withdrawn (the following week) and was never advised during that week that Mr. Murray had secured another buyer or that the seller or other persons working on her behalf had done so. Mr. Smetana, himself, did not begin looking for other buyers until the end of September. See: Testimony at pages 23-24; and 27-28.

even necessary for another buyer to be secured since the Appellants were ready, willing and able to purchase the house as of September 19, 1975 and the ultimate buyer did not appear on the scene until the end of September.

It is clear from the evidence that the Appellee's son, who was acting for and on her behalf (See: Stipulation of Agreed Upon Facts), sought to have the initial acceptance of the Appellants offer in August, 1975 delayed for several days so as to enable the Appellee to atemptt to locate another purchaser; and that, at that time, the racial identification of the Appellants had been ascertained and spoken about.

Even if we were to assume that the contract clauses which the Appellant sought to have incorporated into the closing document were not withdrawn until October 3, 1975 (rather than on September 19, 1975 as the overwhelming weight of the evidence establishes) it is clear that the new buyer (and present owner) did not secure the house until several days later (October 8, 1975); and then on really extremely questionable financial terms and arrangements, particularly when the Appellants were apparently more financially willing and able to secure the house on more stable and favorable terms to the Appellee.

The nature of and extent to which the Appellee herein went to avoid selling the premises to the Appellants herein, notwithstanding the willingness and capability of the Appellants to purchase the premises without condition prior to the time that the ultimate white purchaser appeared on the scene, is highlighted by the fact that Mr. Beer was not capable of adequately financing the house at the time of the purchase (unlike the Appellants): and such was acknowledged by and through the financial arrangements made with the seller, including an extended period of time within which to close title (the period of time was initially

from October, 1975 through February, 1976 and was ultimately extended to April, 1976), See: Deposition of Menahem Mendel Beer (in evidence) at pages 59-60, so as to permit Mr. Beer to sell his old house (a problem which the Appellants did not possess since they resided at time in an apartment) in order to secure the necessary monies for the purchase of the Appellee's premises.

Furthermore, the Appellants, upon learning of the new purchaser in October (again well after they had withdrawn their conditions and prior to the time when the ultimate purchaser was found), offered to meet a bona fide purchase price. They were denied that opportunity. Assuming, for argument sake, that with the additional $1000.00 and the $2000.00 savings relative to the broker's fee, the Appellants would have been required to make a bid of $48,000.00, the evidence establishes that they were prepared to do so (See: Testimony of Thomas Hoffman in this regard) since such would have been a bona fide price; but they were foreclosed from doing so.

Those, mathematics aside, however, it is apparent that, notwithstanding the ostensibly higher purchase price which the Defendant secured, without a broker's fee, by selling the premises in question herein to Mr. Beer, the extended period of time between contract closing and title closing resulted in the Appellee having to continue to pay on her mortgage and otherwise pay the real property taxes for the extended period of time.

In this regard, the ultimate purchaser did not secure title until April, 1976, almost six months after the initial contract closing in October, 1975. As is noted in West's McKinney's Forms, R.P.P., Section 2:08 at page 25:

> "The date for the closing of title (delivery and final payment) may be conveniently set in most cases *one*

month after the date of the formal contract." Emphasis added.

See also: *Harvey on Real Estate Law and Title Closing*, 3rd Edition, Section 58 at page 49 where the author notes that thirty days is the usual time period for effecting a title closing after the initial contract of sale is entered into.

Thus it is submitted that the ostensible savings supposedly secured by the sale to the ultimate purchaser (relative to the broker's fee) and the additional monies obtained for the purchase of the house ($1000.00) were in large part and in all likelihod dissipated by the unusual length of time incurred in the sales transaction between the contract closing and the title transfer, with the attendant additional monies which necesarily had to be paid out by the Defendant seller herein (property taxes and mortgage payments). Accordingly, the financial reason proposed by the Appellee herein for the ultimate sale of the house of Mr. Beer is pierced.

Thus, it is readily apparent that the Appellants were ready, willing and able to purchase the premises in question and would have done so but for the fact that the seller elected to foreclose them from doing so for no apparent reason, save for their racial considerations which had been raised during the course of the negotiations.

Appellants submit that, as a matter of law, they established by a preponderance of the evidence, if not by the overwhelming weight of the evidence, that they were ready, willing and able to purchase the premises; and that their racial identification, which is totally irrelevant to a real estate transaction, was broached and discussed during the course of the negotations to purchase the house.

Having established the same it was incumbent upon the Appellee to rebut the prima facie case and establish that

race was neither the sole criteria or even a factor in the entire transaction. They failed to do so by the notable absence of any case whatsoever. They do not even pretend to rebut the case by verbal rejection of the Appellants claim. They leave their case to silence; and their silence is legally insufficient.

D. *Summary of evidence and law*

It is clear from the foregoing analysis, that the Appellants, who are Black and who were known by the seller of the property in question and her agents to be Black, were ready, willing and able to purchase the property in question and negotiating for the same with the seller and her agents; that they were refused the opportunity to consummate the closing notwithstanding their desire and ability to do so and their manifestation of the same to the Appellee; that the property was thereafter sold to a white purchaser; and that the Appellee herein failed to rebut the case otherwise established by the Appellants.

In that regard, the evidence establishes that the Appellants and Appellee, through her agents, did agree upon a particular price for the sale of the property in question in August; that delay incurred because the Appellee's attorney was out of the country; and that upon his return, certain closing conditions were proposed by the purchasers and rejected out of hand by the Appellee's attorney (who was then requested to find out from the Appellee herself whether the conditions were acceptable). The proposal of the conditions, including the guarantee of appliances and the maintenance of the property from contract closing to title closing, are conditions normally proposed in the natural course of real estate transaction. The Appellee rejected the same; and the Appellants withdrew their conditions on September 19, 1975, so advising

both the real estate broker and the seller's attorney. The Appellants were refused final closing on the property on September 19, 1975 notwithstanding their manifestation to the Appellee they were ready, willing and able to purchase the property without further ado.

The Appellee asserts that the conditions were withdrawn on October 3, 1975. Notwithstanding the overwhelming weight of the evidence which establishes otherwise, and assuming the same, for argument sake, the Appellants were then ready, willing and able to purchase said house at the previously agreed upon price or at another price; and the Appellee refused them the opportunity nothwithstanding that the house was not sold until October 8, 1975 and then with the white purchaser proposing certain conditions at the contract closing and being permitted to withdraw the same without prejudice. Significantly, two of the three conditions which the Appellants had proposed, and which were otherwise rejected out of hand, with prejudice, were explicitly included within the contract of sale to Mr. Beer. Furthermore, the white purchaser was not able to purchase the house on October 8, 1975, as were the Appellants, without an elaborate financing scheme which included the abnormal period of six months within which to consumate the title transfer. Moreover, Appellants were never given the opportunity of a contract meeting.

Were there, then, apparent reasons raised by and through the Appellants' case, itself, which otherwise reduced the Appellants' case to something less than a prima facie case of discrimination? Certainly, the Appellee did not raise apparent reasons other than race in her own case since she chose not to present a rebuttal case and merely elected to reply upon' silence. It is submitted that those ostensible reasons, other than race, are not estab-

lished by the evidence in the Appellants' case to otherwise subvert the prima facie case made out.

Price reduction notwithstanding, Appellants had the right to equal treatment as to all practices relating to the purchase of the property. Apparently the sale of the premises to the Appellants was a last resort when viewed in the content of the delay and obstinance encountered by the Black Appellants as contrasted to the smooth and unencumbered opportunity provided the ultimate white purchasers of the property.

It is submitted that those apparent reasons, other than race, are pierced and merely pretextual;[23] and that, accordingly, what is left is the Appellants' prima facie case, unrebutted.

As a consequence, the District Court had no other alternative, on the law, and in view of the facts, but to award judgment for the Appellants; and its failure to do so was reversible error.

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[23] Under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. Section 2000(e) *et seq.*) once the Plaintiff has established a prima facie case of discrimination based on race, the Defendants are thereafter permitted to establish that there are reasons other than race for the action taken. However, the Plaintiff still has the opportunity to pierce those otherwise apparently non-racial reasons; and to establish the "pretextual" nature of the apparently non-racial reasons. See: *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 688 (1973), *Madison* v. *Jeffers,* 494 F.2d 114, 117-119 (4th Cir. 1974) (Butzner, *J.* dissenting), 500, 505-506; *Long* v. *Ford Motor Company.* It is submitted that in the instant case, as well, the apparent nonracial reasons which the Appellee seeks to make out in the Appellants' case (as a means of asserting that they failed to make out a prima facie case) are pierced. Certainly, the Appellee should be required to establish the apparent nonracial reasons by a preponderance of the evidence in their case in rebuttal; and by failing to present such a case she cannot now rely upon the Appellants' case for the same.

CONCLUSION

In view of the foregoing, Appellants submit that they have made out a prima facie case of racial discrimination under the Fair Housing Act of 1968, otherwise referred to as Title VIII of the Civil Rights Act of 1968 (42 U.S.C. Section 3601 *et seq.*) and the Civil Rights Act of 1886 (42 U.S.C. Section 1982) in conjunction with the Thirteenth Amendment to the United States Constitution; and that the Appellee has totally failed to rebut the same no matter how one views the evidence or lack thereof (from the Appellee's perspective); and, accordingly, this Court should reverse the final order of the Court below.

Respectfully submitted,

NATHANIEL R. JONES, Esq.
JAMES I. MEYERSON, Esq.
N.A.A.C.P.
1790 Broadway
New York, New York 10019
(212) 245-2100

Attorneys for Plaintiffs-Appellants

By: /s/ JAMES I. MEYERSON

THOMAS HOFFMAN, ESQ.
200 West 57th Street
Suite # 605
New York, New York 10019
(21) 581-1180

Of Counsel

Certificate of Service

James I. Meyerson, one of the attorneys for the Appellants, certifies that on the 4th day of May, 1977, I did serve three (3) copies of the foregoing Brief and the Appendix related thereto upon the attorney for the Appellee by mailing the same, postage prepaid, first class, as follows: Gerald Murray, Esq., 90-61 Sutphin Boulevard, Jamaica, Queens, New York 11435.

Respectfully submitted,

JAMES I. MEYERSON, ESQ.
N.A.A.C.P.
1790 Broadway
New York, New York 10019
(212) 245-2100

Attorney for Appellants

By: /s/ JAMES I. MEYERSON